



IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-768

KENNETH O. GASPER, ET AL.,
Petitioners,
versus

LOUISIANA STADIUM AND
EXPOSITION DISTRICT, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF IN OPPOSITION

WILLIAM J. GUSTE, JR.
Attorney General
SAM L. LEVKOWICZ
Staff Attorney
Department of Justice
State of Louisiana
KENDALL L. VICK
Trial Attorney
Assistant Attorney General
BARBARA S. BRUCKNER
Staff Attorney
Department of Justice
State of Louisiana
HARRY McCALL, JR.
Special Counsel
1500 First N.B.C. Bldg.
New Orleans, Louisiana 70112
Telephone: 504/568-1320
Attorneys for Respondents

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The opinion of the District Court (App. 11a-27a of Petition) is reported at 418 F. Supp. 716 and the opinion of the Court of Appeals for the Fifth Circuit (App. pp. 1a-9a of Petition) is unreported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the courts below were correct in holding that a governmental authority's permissive attitude toward the smoking of tobacco products by patrons of a publicly owned stadium did not violate any rights of nonsmoking patrons under the First, Fifth, Ninth or Fourteenth Amendments to the United States Constitution?

2. Whether the courts below were correct in holding that smoking of tobacco products by patrons of a publicly owned stadium did not give nonsmoking patrons a cause of action against the owner of the stadium pursuant to 42 U.S.C. § 1983 for violation of their constitutional rights?

COUNTER-STATEMENT OF THE CASE

The Louisiana Stadium and Exposition District ("District") is a political subdivision of the state of Louisiana established for the purpose of owning and operating a multipurpose stadium located in New Orleans, Louisiana, commonly known as the Superdome. The District has not passed any regulation prohibiting the use of tobacco products by persons

attending events in the Superdome. Accordingly, Superdome patrons may and do smoke cigarettes and other tobacco products in the stadium, and can purchase tobacco products at concessions located within the stadium.

Petitioners requested the district court to force the District to prohibit smoking of tobacco products by persons attending events at the Superdome. The complaint alleged that exposure to tobacco smoke in the stadium causes serious physical harm and discomfort to nonsmoking patrons and prevents them from attending events at the Superdome. The complaint further alleged that the District's permissive attitude towards smoking in the Superdome violates the rights of nonsmoking patrons guaranteed by the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution. Petitioners invoked jurisdiction of the court pursuant to the provisions of 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3).

The District filed a motion to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6) on the grounds that the complaint failed to state any violation of constitutional rights and therefore failed to state a cause of action under 42 U.S.C. § 1983. The district court granted the motion, holding that the First, Fifth, Ninth, and Fourteenth Amendments do not impose a duty upon the District to prohibit smoking by persons attending events at the Superdome. The court analyzed each of the claimed constitutional rights separately, but the essence of its decision was that:

"[T]he process of weighing one individual's right to be left alone, as opposed to other individuals' alleged rights under the Fifth and Fourteenth Amendments, is better left to the processes of the legislative branches of government. . . . This Court is not prepared to accept the proposition that life-tenured members of the federal judiciary should engage in such basic adjustments of individual behavior and liberties." Petition, App. C., pp. 21a, 23a.

The court of appeals affirmed. After noting that "[w]hat [the complaint] all comes down to is that the plaintiffs claim a constitutional right to stop other individuals from smoking in the Superdome while a performance is in progress" (Petition, App. A, 2a), the court concluded that no such constitutional right existed. Petitioners' request for rehearing or rehearing en banc was denied. (Petition, App. B)

ARGUMENT

In this case the petitioners ask the Court to review the refusal of the lower courts to find that the Constitution requires the state to prohibit persons from smoking tobacco products while attending events in publicly owned facilities. The Petition in support of this request consists largely of a discourse on the supposed evils of smoking and a repetition of petitioners' arguments to the courts below, neither of which is relevant to the determination whether review of the court

of appeals' decision is warranted. The absence of pertinent argument is not surprising, however, for the decisions below are supported both by a long line of authorities and by sound principles of constitutional interpretation. For these reasons the case does not warrant plenary review in this Court.

I. The Decisions Below Are In Accord With The Decisions Of All Other Lower Courts And Are Consistent With The Reasoning Of Prior Decisions Of This Court

Contrary to petitioners' assertion (Petition p. 2), the issues presented by this case are not de novo. Although petitioners may have been the first to claim a constitutional right to be free from exposure to atmospheric tobacco smoke, that claim represents only a narrower aspect of the commonly asserted constitutional right to a clean environment, which has been considered and rejected by numerous courts. *E.g.*, *Ely v. Velde*, 451 F.2d 1130, 1139 (4th Cir. 1971); *Pinkney v. Ohio Environmental Protection Agency*, 375 F.Supp. 305, 310 (N.D. Ohio 1974); *River v. Richmond Metropolitan Authority*, 359 F.Supp. 611, 640-41 (E.D. Va. 1973), *aff'd*, 481 F.2d 1280 (4th Cir. 1973); *Hagedorn v. Union Carbide Corporation*, 363 F.Supp. 1061, 1064-65 (N.D.W. Va. 1973); *Tanner v. Armco Steel Corporation*, 340 F.Supp. 532, 535-37 (S.D. Tex. 1972); *Environmental Defense Fund, Inc. v. Corps of Engineers*, 348 F.Supp. 916, 921 n.4 (N.D. Miss. 1972), *aff'd*, 492 F.2d 1123 (5th Cir. 1974); *Virginians for Dulles v. Volpe*, 344 F.Supp. 573, 578-79 (E.D. Va. 1972), *aff'd in part and rev'd*

in part, 541 F.2d 442 (4th Cir. 1976). The holding of the district court in *River v. Richmond Metropolitan Authority*, *supra*, is typical of these decisions:

"The plaintiffs allege that the acts of the defendants violate their rights under the Fifth, Ninth, and Fourteenth Amendments to a clean, nondegraded environment. As important as an unpolluted environment may be and indeed is to us all, no court has gone so far as to say that an individual has a fundamental right under the Constitution to a clean environment which can be impaired only upon a showing of compelling state interest. This court declines to participate in any such judicial lawmaking."

Subsequent to the district court's decision in the instant case, two more lower courts dismissed similar claims. *Federal Employees for Non-Smokers' Rights v. United States*, 446 F.Supp. 181, 182 (D.D.C. 1978) (nonsmokers have no constitutional right to be free of tobacco smoke in federally owned buildings); *Township of Long Beach v. City of New York*, 445 F.Supp. 1203, 1212 (D.N.J. 1978) (no constitutional right to a clean environment exists). No court to respondents' knowledge has reached a contrary conclusion. Thus, the decisions below simply represent a particular application of a well reasoned and unanimous line of authorities.

The decisions are also consistent with the constitutional principles established by this Court. Indeed, the very case upon which petitioners primarily rely, *Pollak v. Public Utilities Commission*, 343 U.S. 451 (1952) (Petition pp. 13-15), virtually compels the result reached below. *Pollak* was an action to enjoin radio broadcasts in public buses on the theory that such broadcasts interfered with the First and Fifth Amendment rights of plaintiffs, who had to ride the buses to and from work. The court of appeals held that the complaint stated a cause of action. This Court reversed. Although petitioners argue that this reversal was based solely on the Court's finding that the broadcasts did not interfere with public safety, comfort, or convenience, the Court expressed a more fundamental basis for the decision:

"[Plaintiffs'] position wrongly assumes that the Fifth Amendment secures to each passenger on a public vehicle regulated by the Federal Government a right to privacy substantially equal to the privacy to which he is entitled in his own home. However complete his right of privacy may be at home, it is substantially limited by the rights of others when its possessor travels on a public thoroughfare or rides in a public convenience.

* * * *

The protection afforded to the liberty of the individual by the Fifth Amendment against

the action of the Federal Government does not go that far. The liberty of each individual in a public vehicle or public place is subject to reasonable limitations in relation to the rights of others." 343 U.S. at 464-65.

As the district court below pointed out, the constitutional claim in this case is even less meritorious than the claim rejected in *Pollak*. The action complained of in *Pollak* was affirmatively sanctioned and performed by the government. In the present case, the action complained of — the smoking of tobacco products — is performed by private individuals, and the state has merely taken a hands off position. Nothing in *Pollak* or in any other decision of this Court supports a constitutional requirement that the state prohibit such private conduct.

In short, the decisions below neither involve unsettled questions of law nor conflict with the decisions of any other court.

II. Petitioners' Claims Are Contrary To Established Limits On Constitutional Adjudication

The unanimous rejection of claims similar to those raised by petitioners reflects the courts' recognition that the settlement of social controversies by constitutional adjudication is inappropriate. This case does not involve a claim that individual rights have been en-

croached upon by the state, but rather involves a claim that the rights of one group of individuals are entitled to be favored with constitutional protection over the competing rights of another group of individuals. That assertion, if successful, would stand the Ninth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments on their heads. The Court has traditionally construed these constitutional provisions to contain limits on government suppression of personal conduct, even where such conduct may be deemed offensive to others. See, e.g., *Griswold v. State of Connecticut*, 381 U.S. 479 (1965). Yet petitioners would have this Court apply these provisions to require government suppression of personal conduct. Such a result is contrary not only to prevailing case law but to the very purpose of the Amendments upon which petitioners ground their case.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM J. GUSTE, JR.
Attorney General

SAM L. LEVKOWICZ
Staff Attorney
Department of Justice
State of Louisiana

KENDALL L. VICK
Trial Attorney
Assistant Attorney General

BARBARA S. BRUCKNER
Staff Attorney
Department of Justice
State of Louisiana

HARRY McCALL, JR.

Special Counsel
1500 First N.B.C. Building
New Orleans, LA 70112
Telephone: 568-1320
Attorneys for Respondents

CERTIFICATE OF SERVICE

I certify this ____ day of December 1978 that I have served a copy of the foregoing Brief in Opposition upon Mr. Jacob J. Meyer, 321 St. Charles Avenue, Tenth Floor Suite, New Orleans, Louisiana 70130, Attorney for Petitioners, by mailing same, postage prepaid addressed to him at his respective office.

Harry McCall, Jr.